DEPARTMENT OF STATE REVENUE
LETTER OF FINDINGS NUMBER: 04-0025
Corporate Income Tax
For the Years 1999, 2000, and 2001

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ISSUE

I. Corporate Income Tax—Net Operating Loss

Authority: IC 6-8.1-5-1(b); IRC § 172.

Taxpayer protests the denial by the Department to apply NOLs from previous years to Taxpayer's current assessment.

II. Penalties

Authority: IC 6-8.1-10-2.1; 45 IAC 15-11-2(b) and (c).

Taxpayer seeks an abatement of penalties.

STATEMENT OF FACTS

Taxpayer filed a consolidated gross and adjusted gross income tax return which included three affiliated companies. Audit determined that two of the affiliated companies conducted activities of a financial institution and should have filed Financial Institutions returns; therefore, these two companies should not have been included in corporate income tax returns. Audit excluded the two financial institution affiliates from the gross and adjusted gross income tax returns. This exclusion resulted in assessments of corporate income tax against Taxpayer.

Taxpayer requested that its 1995 - 1997 net operating losses (NOLs) be carried forward to offset income generated in 1999, 2000, and 2001. Taxpayer stated those losses would reduce the assessment by $3,538. Taxpayer acknowledged in its protest letter that the NOLs from tax years 1995 – 1997 inadvertently were not utilized in tax years 1998 – 2000.

DISCUSSION

All tax assessments are presumed to be accurate; the taxpayer bears the burden of proving that an assessment is incorrect. IC 6-8.1-5-1(b).

IRC § 172 allows a deduction for net operating losses. For tax years 1995 – 1997, an NOL could be carried back three years and carried forward fifteen years. An NOL must be carried back before being carried forward unless an election is made to forego the carry back. The election to forego the carry back is found on the federal corporate tax return. *See* Form 1120, Schedule K. A taxpayer must check the box to forego carrying back the NOL. On Taxpayer's 1995/96 federal return, it calculated a loss, but did not check the box on line 14 of Schedule K to forego the carry back. The same is true for 1996 and 1997.

Taxpayer asks that losses from tax years 1995 – 1997 be applied to the current audit assessment. NOLs are applied in a particular way. Taxpayer did not elect to forego carrying back the losses. Additionally, Taxpayer did not utilize the NOLs in tax years 1998 – 2000. Taxpayer has failed to establish the existence of NOLs that could be used to offset the proposed assessment.

<u>FINDING</u>

For the reasons stated above, Taxpayer's protest is denied.

II. <u>Penalties</u>

<u>DISCUSSION</u>

IC 6-8.1-10-2.1 requires that a penalty be imposed if the tax deficiency results from the taxpayer’s negligence. 45 IAC 15-11-2(b) defines negligence as “the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer.” Negligence is to “be determined on a case-by-case basis according to the facts and circumstances of each taxpayer.” *Id.* IC 6-8.1-10-2.1(d) allows the Department to waive the penalty upon a showing that the failure to pay the deficiency was based on “reasonable cause and not due to willful neglect.” 45 IAC 15-11-2(c) requires that in order to establish “reasonable cause,” the taxpayer must demonstrate that it "exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed . . . .” Taxpayer has not shown it used the “ordinary business care and prudence” expected of an “ordinary reasonable taxpayer” that would warrant abatement of the negligence penalty.

<u>FINDING</u>

For the reasons stated above, Taxpayer's protest is denied.

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